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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

FLORENCIO JOSE DOMINGUEZ,

Petitioner,

v.

SCOTT KERNAN, Secretary,
California Department of Corrections
and Rehabilitation,

Respondent.

Case No. 14-cv-2890-BAS-RBB
ORDER DISMISSING PETITION

Petitioner Florencio Jose Dominguez filed this petition for writ of habeas corpus under 28 U.S.C. § 2254 challenging his state court conviction for first-degree murder and conspiracy to commit murder. Since then, a state court has vacated Dominguez’s conviction. Therefore, for the following reasons, the Court dismisses this § 2254 petition because the two claims it raises are moot.

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1 **I. BACKGROUND**

2 **A. Conviction and Direct Appeal¹**

3 In a gang-related incident, fifteen-year-old Moises Lopez was beaten and then
4 executed in Mountain View Park in southeast San Diego. The San Diego County
5 District Attorney charged Dominguez with first-degree murder for the killing.

6 The case proceeded to trial, but the jury deadlocked nine to three in favor of
7 acquittal. Afterwards, the trial judge declared a mistrial and dismissed the case
8 without prejudice pursuant to California Penal Code § 1385. In doing so, the judge
9 noted:

10 Well, this is a tough call because a 15-year-old boy was executed in a
11 park. [¶] The evidence shows the defendant is, in fact, the shot-caller for
12 [the gang]. There is no question about that. He has a double life. He's a
13 good employee and a dad and a husband; but he also has a girlfriend and
14 is an active gang member, in fact, probably the head of that gang. There
is no question he was in the park So he did it, or he obviously knows
who did.

15 The question in this case, though, is one of did the D.A. meet their
16 burden?

17 That's what this case is all about He [the prosecutor] has shown by
18 a preponderance the defendant is the murderer. He has even probably
19 shown by clear and convincing evidence the defendant is the murderer.
20 At this point he has failed to meet—I agree with the nine jurors. If I was
21 to sit and make a call on this case without a jury, I think the D.A. has
22 failed to meet their burden at this point in time [If Dominguez] didn't
23 pull the trigger, he knows who did. He's standing right there. It may be
somebody else, but based on the current state of the evidence, that can't
be proven. And so at this point the matter is dismissed without prejudice.

24 Undeterred, the District Attorney refiled the case with an additional charge for
25 conspiracy to commit murder. Dominguez demurred to the criminal complaint under
26 California Penal Code § 1004. He argued the protection against double jeopardy
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28 ¹ The Court draws this background from the California Court of Appeal's unpublished
opinion, which is available in Lodgment No. 7 (ECF No. 5-32).

1 barred the new complaint because he believes the trial judge dismissed the first case
2 for a lack of evidence—that is, the judge effectively acquitted him of the murder
3 charge. The demurrer was assigned to a different judge, who overruled the demurrer.
4 At the ensuing second trial, the jury found Dominguez guilty of both first-degree
5 murder and the new charge of conspiracy to commit murder.

6 Dominguez appealed, again arguing that double jeopardy principles barred his
7 second prosecution, as well as raising other claims of error. The California Court of
8 Appeal rejected his claims and affirmed the judgment. Petitioner then raised the same
9 claims in a petition for review with the California Supreme Court, which denied the
10 petition without comment.

11 12 **B. Federal Petition**

13 Dominguez did not pursue collateral review in state court. Instead, he filed this
14 action under 28 U.S.C. § 2254. In his habeas petition, Dominguez alleges his state
15 conviction violates the Constitution because: (1) his second “trial was barred by
16 Double Jeopardy”; and (2) he was “denied his constitutional right of confrontation
17 when the judge limited the cross examination” of a witness at trial. (Pet. ¶ 22; *see*
18 *also* Pet. Mem. 10:11–26:17, ECF No. 1.)

19 After the State of California responded, the magistrate judge issued a Report
20 & Recommendation (“R&R”) recommending that this Court grant the petition on
21 double jeopardy grounds. (ECF No. 9.) The R&R also recommends that Petitioner’s
22 Confrontation Clause claim be denied. (*Id.*)

23 The State objected to the R&R, and Dominguez replied. (ECF Nos. 10, 11.)
24 After holding oral argument on the petition, the Court requested supplemental
25 briefing regarding Dominguez’s conspiracy conviction. (ECF Nos. 14, 15.)

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1 **C. State Petition**

2 Meanwhile, with this petition pending, Dominguez filed a second petition for
3 writ of habeas corpus in the state trial court (“State Petition”). The State Petition
4 objected to the prosecution’s use of certain DNA evidence at Dominguez’s second
5 trial. (*In re Dominguez*, No. HC 22238, slip op. at 1 (Cal. Sup. Ct. Oct. 6, 2017)
6 (“Order Granting State Petition”), ECF No. 16, Ex. 1.) This DNA evidence was based
7 on an analysis of mixture samples collected from a pair of bloody gloves found near
8 the scene of the murder. (*Id.* at 5–7.) Mixture samples are samples containing DNA
9 that was contributed from more than one person. (*Id.* at 3, 8.) For several years prior
10 to Dominguez’s second trial, “concern arose within the forensic scientific community
11 regarding some of the techniques used by DNA laboratories in the interpretation of
12 mixture samples.” (*Id.* at 11.) This concern eventually led to the adoption of new
13 guidelines for analyzing these samples. (*Id.* at 12–17.)

14 An evidentiary hearing on the State Petition revealed that the San Diego Police
15 Department’s Crime Laboratory had changed its procedures to conform to the new
16 DNA mixture sample guidelines a few days before Dominguez’s second trial. (Order
17 Granting State Petition at 18.) If these new procedures had been followed to analyze
18 the relevant mixture samples, the prosecution’s expert would have testified that “it
19 was impossible to determine if [Dominguez] was even a minor contributor to the
20 DNA” in either sample presented. (*Id.* at 20.) In other words, the inculpatory DNA
21 evidence at issue would not have been presented at trial. (*Id.* at 21.) Yet, although the
22 prosecution’s own expert was the one responsible for changing the laboratory’s
23 procedures—as he was the lab’s technical manager—he failed to “disclose that the
24 changes in policy had occurred.” (*Id.* at 18.)

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1 Because the change in guidelines was both favorable to Dominguez and
2 material, the state court found this nondisclosure violated *Brady v. Maryland*, 373
3 U.S. 83 (1963). (Order Granting State Petition at 22–35.) Accordingly, the state court
4 granted the petition and vacated Dominguez’s conviction for murder and conspiracy
5 to commit murder. (*Id.*) It further provided that the State could retry Dominguez or
6 otherwise must release him. (*Id.* at 36.) The State did not appeal.

7 Upon learning Dominguez’s conviction had been vacated, this Court issued an
8 order to show cause as to why this federal petition attacking the conviction is not now
9 moot. (ECF No. 18.) Both parties responded. (ECF Nos. 20, 21.)

11 **II. ANALYSIS**

12 Under 28 U.S.C. § 2254, federal courts “shall entertain an application for a
13 writ of habeas corpus [from] a person in custody pursuant to the judgment of a State
14 court only on the ground that he is in custody in violation of the Constitution or laws
15 or treaties of the United States.” 28 U.S.C. § 2254(a). The Constitution limits federal
16 courts’ jurisdiction over habeas petitions, like other actions, to those that present live
17 cases or controversies. *E.g.*, *Spencer v. Kemna*, 523 U.S. 1, 7 (1998); *Burnett v.*
18 *Lampert*, 432 F.3d 996, 999 (9th Cir. 2005). “Failure to satisfy Article III’s case-or-
19 controversy requirement renders a habeas petition moot.” *Mujahid v. Daniels*, 413
20 F.3d 991, 994 (9th Cir. 2005). “[A] case is moot when the issues presented are no
21 longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Powell*
22 *v. McCormack*, 395 U.S. 486, 496 (1969).

23 The claims raised in a federal habeas petition may become moot when the
24 petitioner obtains relief in state court. *See, e.g.*, *Sherwood v. Tomkins*, 716 F.2d 632,
25 634 (9th Cir. 1983) (noting a state court appeal “may result in the reversal of the
26 petitioner’s conviction on some other ground, thereby moot[ing] the federal question”).
27 For instance, in *Cumbo v. Eyman*, 409 F.2d 400, 400 (9th Cir. 1969) (per curiam),
28 the petitioner successfully obtained habeas relief in the district court, and the state

1 appealed. However, while the federal appeal was pending, the state appellate court
2 reversed the petitioner's conviction. *Id.* The Ninth Circuit consequently remanded
3 the action for dismissal, reasoning that the proceeding had "been rendered moot." *Id.*;
4 *see also Hunt v. Eyman*, 405 F.2d 384, 384 (9th Cir. 1968) (concluding an issue raised
5 by a habeas petition was moot where the state court had granted the petitioner relief
6 after the petition was filed).

7 Dominguez filed this petition under 28 U.S.C. § 2254 to challenge his
8 conviction for first-degree murder and conspiracy to commit murder. But the state
9 court has since vacated this conviction. In doing so, it extinguished Dominguez's two
10 claims under § 2254. His claim that he was denied his constitutional right of
11 confrontation at his second trial no longer presents a live controversy. Similarly,
12 Dominguez's claim that his second prosecution violated the Double Jeopardy Clause
13 also does not present a live controversy. He is no longer in custody pursuant to the
14 conviction procured by the second prosecution. Moreover, unlike cases where
15 petitioners have completed their sentences but are still permitted to challenge their
16 convictions because the convictions cause collateral consequences, there is no
17 conviction here for Dominguez to seek to set aside. *See Spencer*, 523 U.S. at 7–9
18 (discussing the role of collateral consequences in satisfying the case-or-controversy
19 requirement); *see also, e.g., Robertson v. Pichon*, 849 F.3d 1173, 1177 n.1 (9th Cir.
20 2017) (noting the court has jurisdiction over a § 2254 habeas appeal because the
21 petitioner "is presumed to experience collateral consequences as a result of his
22 convictions"). At this point, opining on the constitutional condition of Dominguez's
23 second prosecution would be advisory. Therefore, the two claims raised in
24 Dominguez's § 2254 petition are moot.

25 Dominguez, who is represented by counsel, disputes this conclusion. He
26 reports that the State has not released him from custody; rather, it has placed him in
27 pretrial detention and is moving forward with a third prosecution for only conspiracy
28 to commit murder. (ECF No. 21.) He therefore argues his § 2254 petition has been

1 simply transmuted into a pre-trial custody petition. (*Id.* 2:18–3:15.) Dominguez
2 further requests that the Court now summarily: (1) determine abstention is
3 unwarranted, (2) excuse Dominguez from exhausting his pre-trial custody challenge
4 in state court, and (3) find his conspiracy prosecution is barred by collateral estoppel
5 and principles of fundamental fairness. (*Id.* 2:18–6:3.)

6 The Court will not wade into these issues. None of them are properly before
7 it. Nor have they been developed. Dominguez’s § 2254 petition challenges his
8 conviction for murder and conspiracy to commit murder—not his impending third
9 prosecution for only conspiracy. Because his conviction has been vacated, his two
10 claims targeting it under § 2254 are moot. Accordingly, the Court will dismiss the
11 petition.

12 13 **III. CONCLUSION**

14 In light of the foregoing, the Court **DISMISSES** Dominguez’s petition under
15 § 2254 because the two claims it raises attacking his state court conviction are moot.²
16 This dismissal does not preclude Dominguez from seeking other relief.


17 Further, a petitioner may not appeal “the final order in a habeas corpus
18 proceeding in which the detention complained of arises out of process issued by a
19 State court” unless “a . . . judge issues a certificate of appealability.” 28 U.S.C. §
20 2253(c). When a petition is resolved on procedural grounds, a certificate should issue
21 when the petitioner demonstrates “at least, [1] that jurists of reason would find it
22 debatable whether the petition states a valid claim of the denial of a constitutional
23 right and [2] that jurists of reason would find it debatable whether the district court
24 was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).
25 Reasonable jurists would not find it debatable whether this Court is correct in finding
26 Dominguez’s § 2254 claims attacking a now-vacated conviction are moot. *See id.*

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28 ² Because they are moot, the Court also declines to adopt the R&R (ECF No. 9) and
overrules as moot the State’s objections to the R&R (ECF No. 10).

1 Consequently, the Court declines to issue Dominguez a certificate of appealability.
2 *See* 28 U.S.C. § 2253(c).

3 **IT IS SO ORDERED.**

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5 **DATED: January 18, 2018**


6 **Hon. Cynthia Bashant**
7 **United States District Judge**